Supreme Court, U.S.
FILED
OCT 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-575

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND, aka GROND CONTRACTING, INC., a Hawaii corporation,

Plaintiffs-Appellees,

vs.

WILLIAM R. BURT,

Defendant-Appellant.

APPEAL FROM FINAL JUDGMENT
OF SUPREME COURT, STATE OF HAWAII

PLAINTIFFS-APPELLEES' MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM FINAL JUDGMENT OF THE SUPREME COURT OF THE STATE OF HAWAII

JAMES KRUEGER 492
2065 Main Street, #102
Wailuku, Hawaii 96793
Tel: (808) 244-7444

Attorney for
Plaintiffs-Appellees

TABLE OF CONTENTS

PAGE	
i	Table of Contents
ii	Table of Authorities
1	Plaintiffs-Appellees' Motion to Dismiss Appeal, or, in the Alternative, Motion to Affirm Final Judgment of the Supreme Court of the State of Hawaii
1	Memorandum of Law in Support of Plaintiffs-Appellees' Motion to Dismiss Appeal, or, in the Alternative, to Affirm Judgment of the Supreme Court of the State of Hawaii
1	Introduction
2	Background
10	Argument
18	Alternatively, the Final Judgment of the Supreme Court of Hawaii must be affirmed
20	Conclusion
22	Affidavit of James Krueger
23	Certificate of Service
	EXHIBITS

TABLE OF AUTHORITIES

1. CASES	PAGES
Abrams v. Van Schaick, 293 U.S. 188, 55 S.Ct. 135, 79 L.Ed. 278 (1934)	15
Baldonado v. California, 366 U.S. 417, 81 S.Ct. 1355, 6 L.Ed.2d 380 (1961)	15
Benz v. New York State Thruway Authority, 369 U.S. 147, 82 S.Ct. 674, 7 L.Ed.2d 634 (1962)	15
Honeyman v. Hanan, 302 U.S. 369, 58 S.Ct. 245, 82 L.Ed. 307 (1937)	13, 14
Live Oak Water Users' Association v. Railroad Commission of California, 269 U.S. 354, 46 S.Ct. 149, 70 L.Ed. 305 (1926)	11, 12, 13
Parker v. McLain, 237 U.S. 469, 35 S.Ct. 632, 59 L.Ed. 1051 (1915)	15, 16, 17, 20
2. United States Statutes	
28 USC 1446	6
3. Rules of the Supreme Court of the United States	
Rule 16, Rules of the Supreme Court	2
4. Hawaii Revised Statutes	
Hawaii Revised Statute Ch. 658	19

PLAINTIFFS-APPELLEES' MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM FINAL JUDGMENT OF THE SUPREME COURT OF THE STATE OF HAWAII

Plaintiffs-appellees MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND, aka GROND CONTRACTING, INC., a Hawaii corporation (hereinafter collectively referred to as "MAG"), hereby move this Honorable Court for an order dismissing the appeal filed herein by defendant-appellant WILLIAM R. BURT, or, in the alternative, affirming final judgment of the Supreme Court of the State of Hawaii.

MAG submits that BURT has failed to establish sufficient basis for this Court to exercise jurisdiction over the issues raised in his jurisdictional statement and that the final judgment of the Supreme Court of Hawaii validly

determines the rights and obligations of all parties to this action. No substantial federal question is raised by BURT.

This motion is made pursuant to Rule 16 of the Rules of the Supreme Court of the United States, and is based upon the memorandum of law attached hereto, the affidavit of counsel, and attached exhibits, as well as the records and files herein.

DATED: Wailuku, Hawaii, OCT 20 1988.

JAMES KRUEGER
Attorney for Plaintiffs-Appellees

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT OF THE SUPREME COURT OF THE STATE OF HAWAII

I. INTRODUCTION

Dismissal of the appeal is warranted. BURT fails to identify specific grounds in his jurisdictional statement which permit this Court to exercise its jurisdiction over this appeal. No substantial federal question has been raised. BURT's jurisdictional statement fails to identify exactly what federal constitutional rights have been abridged by the Supreme Court of Hawaii, fails to explain the factual basis for alleging denial of due process and equal protection, and fails to establish the nature and extent of the invalidity, if any, of any Hawaii statute in question.

This appeal continues a course of action undertaken by BURT to harass and vex plaintiffs-appellees from the outset. Plaintiffs-appellees have been required to defend frivolous appeals, to incur substantial attorney's fees and costs, and to expend considerable effort and time in order to respond to what has been BURT's abuse of the State and Federal court systems.

II. BACKGROUND

This action originally arose out of a Hawaii state court arbitration proceeding concerning a dispute for fees owed MAG by BURT in connection with the design and construction of a home for BURT in Maui, Hawaii, pursuant to a written architectural and construction contract executed between the parties.

On May 4, 1981, MAG commenced an action in the Second Circuit Court of the State of Hawaii against BURT alleging that valuable work, labor, materials and effort had been provided to BURT who wrongfully refused to pay for such. Thereafter, BURT filed an answer in state court denying the allegations in the complaint and counterclaimed for breach of contract, negligence, fraud, unfair and deceptive practices and other matters.

Pursuant to order dated October 14, 1982, the Second Circuit Court for the State of Hawaii stayed proceedings in the state court and directed that all issues raised by the pleadings between the parties be resolved through arbitration.

Following arbitration hearing in January, 1987, the arbitrators, on March 27, 1987, unanimously concluded that BURT owed MAG the sum of $92,600.00.

Thereafter, MAG moved to confirm the award in state court on April 9, 1987. BURT also moved to vacate or modify the award. MAG's motion was granted; BURT's motion was denied. Reconsideration of said denial, filed by BURT, was also denied. The state court entered its order confirming the arbitration award on May 13, 1987.

On May 19, 1987, BURT moved to amend the pleadings filed earlier in state court and to stay enforcement of the award. BURT's motion was denied.

BURT then appealed the order staying proceedings in the state court pending arbitration, the order

confirming the arbitration award, and the order denying the motion to amend the pleadings, among other matters, to the Supreme Court of the State of Hawaii.

On March 8, 1988, the Supreme Court of the State of Hawaii affirmed the decision of the trial court confirming the arbitration award. A true and correct copy of the memorandum opinion of the Supreme Court of Hawaii is attached hereto as Exhibit "A".

On March 16, 1988, BURT filed a motion for reconsideration of the Hawaii Supreme Court's decision. On March 18, 1988, the Supreme Court of Hawaii summarily denied the motion for reconsideration without argument. A copy of the order denying motion for

reconsideration is attached hereto as Exhibit "B".

On or about March 24, 1988, BURT filed a petition for removal of the proceedings from the Supreme Court of the State of Hawaii to the United States District Court for the District of Hawaii. On or about March 29, 1988, MAG filed a motion to dismiss the petition for removal in the United States District Court for the District of Hawaii. The ground for the motion to dismiss was BURT's failure to comply with 28 U.S.C. §1446. Dismissal was sought because BURT had untimely attempted to remove the action from the state court.

MAG's motion to dismiss petition for removal was granted in its entirety by the Honorable Jack Tanner, a visiting

federal district judge, by order filed in the United States District Court for the District of Hawaii on May 25, 1988, a true and correct copy of which is attached hereto as Exhibit "C".

On April 20, 1988, BURT filed a motion for sanctions pursuant to F.R.C.P. Rule 11 and for partial summary judgment. That motion was dismissed by order filed May 25, 1988 by the Honorable Jack Tanner.

On or about May 13, 1988, BURT filed a motion to amend his petition for removal. That motion was denied by order dated May 20, 1988.

On May 24, 1988, BURT filed a motion for reconsideration of the order of May 20, 1988, denying his motion to amend petition for removal. By order

filed May 26, 1988, Judge Tanner denied BURT's motion for reconsideration.

By letter dated May 27, 1988, Walter A.Y.H. Chinn, the Chief Clerk of the United States District Court for the District of Hawaii, advised the Clerk of the Supreme Court of the State of Hawaii that, as of May 25, 1988, the federal action was remanded to the Supreme Court of Hawaii. A copy of said letter is attached hereto as Exhibit "D".

On June 1, 1988, the Supreme Court of the State of Hawaii, recognizing its jurisdiction to act following remand of the federal action, entered a judgment on appeal affirming the judgment of the state trial court entered on May 13, 1987. A copy of said judgment on appeal is attached hereto as Exhibit "E".

On June 6, 1988, BURT filed an amended notice of appeal in the United States District Court, appealing to the United States Court of Appeals for the Ninth Circuit the following orders: (1) order granting plaintiffs' motion to dismiss petition for removal; (2) order denying defendant's motion for partial summary judgment; (3) order denying defendant's motion to amend; and (4) order denying defendant's motion for reconsideration.

On July 20, 1988, MAG filed their motion to dismiss notice of appeal in the United States Court of Appeals for the Ninth Circuit. MAG's motion to dismiss the appeal for lack of jurisdiction was granted by the U.S. Court of Appeals for the Ninth Circuit pursuant to Order filed July 28, 1988, a

true and correct copy of which is attached hereto as Exhibit "F". Additionally, MAG's request for the imposition of sanctions against BURT was granted by the Ninth Circuit in the July 28, 1988 order.

On August 3, 1988, BURT filed his motion for reconsideration of the July 28, 1988 order. No order on BURT's motion for reconsideration has been entered by the U.S. Court of Appeals as of the date of submission of this motion.

III. ARGUMENT

A. NO SUBSTANTIAL FEDERAL QUESTION IS RAISED FOR THIS COURT TO EXERCISE JURISDICTION OVER BURT'S APPEAL

The jurisdictional statement filed herein by BURT lacks any identification of a substantial federal question. BURT

peripherally argues that his equal protection and due process rights have been violated by the Supreme Court of Hawaii. However, the record is devoid of analysis or reasoning behind BURT's claims.

In Live Oak Water Users' Association v. Railroad Commission of Califorinia, 269 U.S 354, 46 S.Ct. 149, 70 L.Ed. 305 (1926), the United States Supreme Court, in an appeal claiming error made by the Supreme Court of California, dismissed the appeal for lack of substantial federal question. The Court stated, with respect to whether the judgment of the California Supreme Court was reviewable as error:

> The cause is here upon writ of error. Considering the circumstances disclosed by the record, we have no jurisdiction unless it

> affirmatively appears that in the court below there was duly drawn in question the validity of a statute of or an authority exercised under the State because of repugnance to the Constitution, treatise or laws of the United States. 269 U.S. 356

In responding to appellants' claim that the judgment of the Supreme Court of California impaired the obligations of the parties' contracts, that appellants' property had been taken without due process of law and furthermore that appellants had been denied equal protection of the law, the United States Supreme Court rejected such an argument.

> This statement shows no jurisdiction here under the writ of error, although it specifies a Federal question justiciable by certiorari. Something more than a claim of Federal right is necessary; the attack must be upon the validity of the order, not

merely upon the court's judgment. 269 U.S. 357 [Emphasis supplied]

This Court, in Live Oak Association, concluded that plaintiffs in error failed to raised a Federal question at the State court level and that the State court had decided a local question based on local law adequate to support its judgment. Thus, the Court concluded that the California Supreme Court's decision upon a point of local law was sufficient to support its judgment and left no Federal question open for determination. 269 U.S. 359

In Honeyman v. Hanan, 302 U.S. 369, 58 S.Ct. 245, 82 L.Ed. 307 (1937), on a motion to dismiss, the United States Supreme Court dismissed an appeal from the Supreme Court of New York wherein the State's highest court affirmed a

judgment dismissing an action on a bond. In dismissing the appeal, the United States Supreme Court agreed with appellee that want of a jurisdiction existed.

> The Federal Constitution does not undertake to control the power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords a fair opportunity to be heard before the issues are decided. The question of the validity of the State legislation could have been raised in the foreclosure action and brought to this Court in accordance with the applicable rules.
>
> The requirement that the right to a deficiency judgment should be determined in the foreclosure action as against one who is a party to that action raises no substantial Federal question. [Citations omitted] 302 U.S. 378

See also, Benz v. New York State Thruway Authority, 369 U.S. 147, 82 S.Ct. 674, 7 L.Ed.2d 634 (1962); Baldonado v. California, 366 U.S. 417, 81 S.Ct. 1355, 6 L.Ed.2d 380 (1961); Abrams v. Van Schaick, 293 U.S. 188, 55 S.Ct. 135, 79 L.Ed. 278 (1934)

In Parker v. McLain, 237 U.S. 469, 35 S.Ct. 632, 59 L.Ed. 1051 (1915), the United States Supreme Court dismissed an appeal claiming that the Supreme Court of Kansas had erred in entering judgment for plaintiff/appellee. In dismissing the writ of error, the United States Supreme Court concluded that the Federal questions raised before it "were plainly devoid of merit as to afford no basis for a review in this Court." 237 U.S. 474

In addressing the frivolity of appellant's claims, the Court stated:

> Our jurisdiction to review the judgment of the highest court of a State turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision. Judicial code, section 237. And to be effective for this purpose, the assertion of a Federal right must be frivolous or wholly without foundation. It must at least have fair color of support, for otherwise an utterly baseless Federal right might be set up or claimed in almost any case, and the jurisdiction of this court invoked merely for purposes of delay. [Citations omitted] 237 U.S. 472

The Parker court determined that appellant's claims were questions of local law and practice and that the decision of the state supreme court on those issues was controlling. The Court found no merit to appellant's contentions that its due process of law

and the equal protection of the laws secured by the Fourteenth Amendment had been contravened. Consequently, the court dismissed appellant's appeal.

This Court, in the instant case, is without sufficent information to conclude that a substantial Federal question is presented by BURT. In his jurisdictional statement, BURT merely contends that his due process and equal protection rights under the Fourteenth Amended have been violated. However, BURT does not identify in what respect such rights have been violated by way of the judgment entered against BURT by the Supreme Court of Hawaii.

Even in spite of giving every benefit of the doubt to BURT, this Court must conclude that his appeal is frivolous and seriously lacks sufficient

merit to warrant the jurisdiction of this Court.

Accordingly, MAG's motion to dismiss appeal should be granted.

B. ALTERNATIVELY, THE FINAL JUDGMENT OF THE SUPREME COURT OF HAWAII MUST BE AFFIRMED

In its memorandum opinion [Exhibit "A"], the Supreme Court of Hawaii affirmed the state trial court's confirmation of an arbitration award in favor of MAG. In so ruling, the Hawaii Supreme Court concluded that state courts should not, as a general rule, overrule an arbitrator's decision where the arbitrator's intervention was bargained for. The Hawaii Supreme Court also concluded that judicial review of arbitration cases is strictly limited because the intent of the parties, in

pursuing arbitration, is to avoid litigation and because the legislative objective in enacting Hawaii Revised Statute Chapter 658 was to restrict and curtail judicial review of arbitration awards.

The Hawaii Supreme Court, upon review of the entire record, concluded there were insufficient grounds to vacate or modify the arbitration award entered in favor of MAG.

An adequate state ground supports the Hawaii Supreme Court's decision.

The original proceeding before the state courts of Hawaii concerned the validity of the arbitration award. BURT has failed to show this Court what issues other than purely local concerns (involving Hawaii law and procedure) are raised before this Court.

The United States Supreme Court has already addressed, in Park v. McLain, supra, that where matters of purely local law and practice are raised, and no substantial Federal question is raised, that it would not have jurisdiction to entertain an appeal under those circumstances. The same situation applies here. No substantial Federal question has been raised by BURT.

Accordingly, this Court is asked to affirm the judgment of the Supreme Court of Hawaii.

CONCLUSION

Based on the foregoing argument, and upon the strength of the authority cited herein, this Court is asked to dismiss the appeal filed herein by BURT and/or, in the alternative, affirm the

final judgment of the Supreme Court of the State of Hawaii.

DATED: Wailuku, Hawaii, OCT 29 1988.

JAMES KRUEGER
Attorney for
Plaintiffs-Appellees

AFFIDAVIT OF JAMES KRUEGER

STATE OF HAWAII)
) SS.
COUNTY OF MAUI)

JAMES KRUEGER, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly licensed to practice law in the State of Hawaii and am the attorney representing plaintiffs-appellees herein.

2. That Exhibits "A" through "F" attached hereto are true and correct copies of the originals.

FURTHER AFFIANT SAYETH NAUGHT.

JAMES KRUEGER

Subscribed and sworn to before me
this 25th day of October 1988.

Notary Public, State of Hawaii
My commission expires: 5/1/91

CERTIFICATE OF SERVICE

I, JAMES KRUEGER, attorney for plaintiffs-appellees herein, hereby certify that a true and correct copy of plaintiffs-appellees' motion to dismiss appeal, or, in the alternative, motion to affirm final judgment of the Supreme Court of the State of Hawaii, was duly served by mail, by deposting said document in a U.S. post office mailbox, first-class, postage pre-paid, addressed to WILLIAM R. BURT, 480 Hoopalua Drive, Pukalani, Hawaii 96768, on October 29, 1988, pursuant to Rule 28.5(b) of the Rules of the Supreme Court of the United States.

DATED: Wailuku, Hawaii, OCT 29 1988

JAMES KRUEGER
Attorney for
Plaintiffs-Appellees

JAMES KRUEGER
244-7444
81-01

NO. 12259

IN THE SUPREME COURT OF THE STATE OF HAWAII

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND CONTRACTING, aka Grond Contracting, Inc., a Hawaii corporation,	CIV. NO. 5300(2)
Plaintiffs-Appellees,	APPEAL FROM: (1) ORDER GRANTING PLAINTIFFS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION, FILED OCTOBER 14, 1982; (2) ORDER CONFIRMING AMERICAN ARBITRATION AWARD; ENTRY OF JUDGMENT AND JUDGMENT AND DENYING DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT ARBITRATION AWARD, FILED MAY 13, 1987; (3) ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT AMERICAN ARBITRATION AWARD, FILED JUNE 1, 1987; (4) ORDER DENYING DEFENDANT'S MOTION FOR DISQUALIFICATION AND DENYING DEFENDANT'S MOTION TO AMEND PLEADINGS TO INCLUDE ADDITIONAL COUNTERCLAIM UNDER RULES 59(a) and 59(e) OF THE HAWAII RULES OF CIVIL PROCEDURE AND STAY UNDER SECTION 641-3(c) OF THE HAWAII REVISED STATUTES, FILED JUNE 24, 1987
vs.	
WILLIAM R. BURT,	
Defendant-Appellant.	SECOND CIRCUIT COURT
	HONORABLE ARTHUR T. UEOKA and RICHARD R. KOMO, JUDGES

MEMORANDUM OPINION

Defendant-appellant William R. Burt appeals from the order of the Circuit Court of the Second Circuit granting the motion for a stay of proceedings pending arbitration filed by

EXHIBIT A

Plaintiffs-appellees Maui Architectural Group, Inc. (MAG) and Konrad Grond Contracting (Grond) and from the subsequent order of the court confirming the arbitration award. [1/] The defendant-appellant argues, inter alia, that the circuit court should not have entertained the motion to stay proceedings in view of the plaintiffs-appellees' default in seeking arbitration, and the plaintiffs-appellees argue the defendant-appellant's notice of appeal was untimely. We resolve these threshold questions in favor of arbitrability and appealability; and after reviewing the record we affirm the circuit court's confirmation of the award.

I.

On December 19, 1978, Burt entered into a contract with MAG for the preparation of architectural plans for a "residence and garage" in the Kula 200 subdivision, Kula, Maui, agreeing to pay MAG twelve percent of the construction costs for its services. On July 9, 1979, Burt entered into two separate construction contracts with Grond dated July 9, 1979 and July 10, 1979. [2/] Under the contract dated July 9, 1979, Burt "agree[d] to pay [Grond] the sum of $192,000.00." The contract dated July 10, 1979, however, provided that Burt would "pay [Grond] the sum of material

---

1/ More specifically, Burt appeals from the following: (1) Order Granting Plaintiff's Motion to Stay Proceedings Pending Arbitration, filed October 14, 1982; (2) Order Confirming American Arbitration Award; Entry of Judgment and Judgment, filed May 13, 1987; (3) Order Denying Motion for Reconsideration of Denial of Defendant's Motion Under Section 658-8, H.R.S., to Vacate, Modify or Correct American Arbitration Award, filed June 1, 1987; and (4) Order Denying Defendant's Motion for Disqualification and Denying Defendant's Motion to Amend Pleadings, filed June 24, 1987.

2/ The fact that two contracts were executed is of no consequence in this appeal.

 EXHIBIT A-2

and labor plus 10% profit." Paragraph 9.1 of the contract between Burt and MAG read:

> All claims, disputes and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise.

The contracts between Burt and Grond also provided that disputes arising thereunder were "subject to arbitration."

Grond constructed a home for Burt "[p]ursuant to [MAG's] drawings, plans, and specifications." It submitted a bill for $253,928.85, but Burt paid the contractor only $171,657.64. On May 4, 1981 the plaintiffs filed a complaint against Burt, alleging they "provided valuable work, labor, materials and effort to" Burt who "wrongful[ly] refus[ed] to pay." They prayed for "such sums of money and damages as are owed . . . to the plaintiffs."

Burt responded on May 27, 1981, denying plaintiffs' allegation that he wrongfully refused to pay and asserting a multitude of defenses. He also brought a counterclaim against the plaintiffs, alleging causes of action for "Breach of Contract by Architect," "Negligence of Architect," "Negligent Infliction of Mental Distress by Architect," "Breach of Contract by Contractor," "Negligent Construction by Contractor," "Fraud and Conspiracy of Architect and Contractor," "Unfair and Deceptive Acts or Practices in the Conduct of a Trade or Business by Architect and Contractor," and "Willful Misconduct and Punitive Damages" [3/] and

---

3/ Burt's counterclaim alleged, inter alia, that MAG "fail[ed] to prepare change orders for alterations in construction of [his] home," "failed to timely advise [him] of [the] acts of [Grond] and cost overruns by

EXHIBIT A-3

seeking special, general, and punitive damages, fees and costs, and "such other and further relief as the [c]ourt may deem to be just."

Plaintiffs moved for a stay of proceedings pending arbitration on July 8, 1981. Claiming a firm trial date was not available "until April or May . . . next year," they maintained that "this matter [could be] resolved in the next few months" by arbitration. Burt argued in opposition that the plaintiffs' commencement of "legal action without in any way insisting upon their right to arbitration or taking any steps to preserve that right[]" and their claim of such right "after a delay of fourteen months . . . preclude [p]laintiffs' attempt to enforce arbitration." The motion was heard and a stay was orally granted on September 30, 1982. Burt sought permission to seek interlocutory appellate review of the stay order, but his request was denied. And on October 14, 1982 the circuit court entered an order staying proceedings in court and directing that "all issues raised by the pleadings herein to date" be resolved through arbitration.

Arbitration commenced on January 5, 1987. Three days of hearings followed on January 6, 7, and 19, 1987. On March 27,

---

3/ (Continued).

[Grond]," and that MAG's "negligent conduct has caused [him] great mental distress." Grond, Burt averred, "fail[ed] to construct [his] home in conformity with the contract plans" and "negligently performed the construction work." Furthermore, Burt contended "[p]laintiffs acted in concert and conspired together in the misrepresentation of material facts concerning the progress and cost of the construction of [his] home"; such actions "constitute unfair and deceptive acts in the conduct of a trade or business," and the breach of contract by plaintiffs was "willful and . . . for the purpose of economically oppressing . . . and cheating him."

EXHIBIT A-4

1987, the arbitrators, "having duly heard the proofs and allegations of the parties," concluded Burt owed the contractor $73,275 more than he paid plus $8,000 in attorney's fees. The arbitrators also concluded Burt owed MAG $11,325.

Plaintiffs moved to confirm the award on April 9, 1987. Two weeks later, Burt moved to have the award vacated or modified. The plaintiffs' motion was granted; Burt's was denied. Reconsideration of the denial of the motion to vacate or modify the award was denied too. On May 13, 1987, the trial court after "having considered the papers and pleadings on file" entered the written order confirming the arbitration award. On May 19, 1987, Burt moved to amend the pleadings filed earlier in the court and to stay enforcement of the award. The court denied the motion and this appeal followed.

II.

We begin our analysis of the issues posed on appeal by considering whether the appeal from the circuit court's order granting plaintiffs' stay of proceedings pending arbitration is timely. Citing Barthrop v. Kona Coffee Co., 10 Haw. 398, 401 (1896); Mackenzie v. Choi, 47 Haw. 298, 302-03, 387 P.2d 475, 477-78 (1963); Gomes v. Heirs of Kauwe, 52 Haw. 126, 126-27, 472 P.2d 119, 119-20 (1970); and Association of Owners of Kukui Plaza v. Swinerton & Walberg Co., 68 Haw. ____, ____, 705 P.2d 28, 35 (1985), the plaintiffs argue the order entered on October 14, 1982 was a final and appealable order for which leave to appeal was not necessary. And since Burt failed to file a notice of appeal from the entry of the order within thirty days, they

EXHIBIT A-5

contend the order is now not appealable. [4/] We cannot agree. [5/]

In Swinerton we said "orders granting stays and compelling arbitration are appealable." Id. But on October 14, 1982, when the trial court stayed proceedings pending arbitration, the prevailing rule as expressed in Pfaeltzer v. Patterson, 49 Haw. 59, 60, 410 P.2d 974, 974 (1966), was that an order staying proceedings pending arbitration "being interlocutory, an appeal therefrom can be had only upon the allowance of the circuit judge." Id. Plaintiffs' reliance on Swinerton is misplaced since the opinion was not issued until 1985. Hence, Burt correctly sought permission for an interlocutory appeal when plaintiffs' motion was granted. Having been denied leave then, his appeal after the confirmation of arbitration award, if timely, covered an appeal from the earlier order.

III.

Turning to the issues raised by Burt, we first address his contention that plaintiffs' "conduct was [in]consistent with a reliance upon the arbitration provisions in the contracts" and plaintiffs therefore "waived their right to enforce the arbitration provisions."

4/ Hawaii Rules of Civil Procedure (HRCP) Rule 72(b) reads: "[N]otice of appeal shall be filed in the circuit court within 30 days after the person desiring to appeal is notified of the rendering or entry of the decision or order, or of the action taken, in the manner provided by statute."

5/ The plaintiffs do not argue in their brief that the defendant's appeal was untimely under our ruling in Salud v. Financial Security Ins. Co., 69 Haw. ___, 745 P.2d 290 (1987). An application of the holding there to the facts here would result in the conclusion that the defendant's appeal to this court was untimely. But since the opinion in Salud was only issued on November 10, 1987, we choose not to declare that we lack jurisdiction to entertain the appeal.

EXHIBIT A-6

A.

Summarizing the precepts applicable when waiver is an issue, we said in Swinerton that "'the proclaimed public policy . . . to encourage arbitration as a means of settling differences' preclude a court from lightly inferring a waiver of a right to arbitration or a default in proceeding thereto." Swinerton, 68 Haw. at ____, 705 P.2d at 35 (quoting Gregg Kendall & Associates v. Kauhi, 53 Haw. 88, 93, 488 P.2d 136, 140 (1971)). "Waiver is generally defined as an 'intentional relinquishment of a known right,' a 'voluntary relinquishment of some rights,' and 'the relinquishment or refusal to use a right.' State Savings & Loan Association v. Kauaian Development Company, 50 Haw. 540, 557, 445 P.2d 109, 121 (1968); Robinson v. McWayne, 35 Haw. 689, 719 (1940)." Anderson v. Anderson, 59 Haw. 575, 586-87, 585 P.2d 938, 945 (1978) (quoted in Swinerton, 68 Haw. at ____, 705 P.2d at 36). Though we concluded there was no waiver of a right to arbitration in Swinerton, we indicated there would have been one "if the [plaintiffs'] conduct [could have been] deemed inconsistent with a reliance on the contract." Id. at ____, 705 P.2d at 36. But as we stated earlier, Swinerton was not controlling when the plaintiffs moved for a stay pending arbitration. And as we did earlier in deciding the defendant's appeal was a timely one, we choose to exercise lenity in applying a rule enunciated in an opinion issued after the circuit court acted.

B.

Having decided in favor of arbitrability, we turn to Burt's contention that the award should be vacated because the

EXHIBIT A-1

arbitrators were guilty of misconduct.

"[J]udicial review in arbitration cases is strictly limited, since 'extensive judicial review of arbitration awards would frustrate the intent of the parties to avoid litigation and would also nullify the legislative objective in the enactment of the Arbitration and Awards statute [HRS Ch. 658].'" University of Hawaii Professional Assembly ex rel. Daeufer v. University of Hawaii, 66 Haw. 214, 224, 659 P.2d 720, 727 (1983) (quoting Mars Constructors, Inc. v. Tropical Enterprises, Ltd., 51 Haw. 332, 335, 460 P.2d 317, 319 (1969)). Accordingly, "only when one of the grounds specified in [Hawaii Revised Statutes (HRS)] §§ 658-9 [6/] and 658-10 [7/] is met can an arbitrator's award be

---

6/ HRS § 658-9 (1985) reads in relevant part:

> **Vacating award.** In any of the following cases, the court may make an order vacating the award, upon the application of any party to the arbitration:
>
> (1) Where the award was procured by corruption, fraud, or undue means;
>
> (2) Where there was evident partiality or corruption in the arbitrators, or any of them;
>
> (3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced;
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject matter submitted, was not made.

7/ HRS § 658-10, in pertinent part, reads:

> **Modifying or correcting award.** In any of the following cases, the court may make an order modifying or correcting the award, upon the application of any party to the arbitration:

EXHIBIT A-8

vacated or modified." Id. at 224-25, 659 P.2d at 727-28 (citing Mars, 51 Haw. at 336, 460 P.2d at 319-20) (footnotes omitted)). "Thus, the fact that an arbitrator may err in applying the law, finding facts, or in construing the contract, or enters an award that is contrary to the evidence adduced, is insufficient grounds for judicial reversal." Id. at 225, 659 P.2d at 728 (citing Kim v. Mel Cummins Building Contractor, Inc., 57 Haw. 186, 187-88, 552 P.2d 1117, 1118 (1976)). Indeed, "'[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.'" Id. at 225-26, 659 P.2d at 728 (footnote omitted) (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)); see also United Paperworkers International Union v. Misco, Inc., ____ U.S. ____, ____, 108 S. Ct. 364, 370 (1987).

1/ (Continued).

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award;

(2) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof, and promote justice between the parties.

EXHIBIT A-9

Based on our review of the record, we cannot conclude there were sufficient grounds to vacate or modify the arbitration award. [8/]

Affirmed.

DATED: Honolulu, Hawaii, March 9, 1999.

Shackley F. Raffetto (Jaress & Raffetto, of counsel) for appellant

James Krueger (Magali V. Richter with him on the brief) for appellees

---

8/ We also find the defendant's argument that he should have been allowed to amend his pleadings is totally lacking in merit.

EXHIBIT A-10

NO. 12259

IN THE SUPREME COURT OF THE STATE OF HAWAII

FILED
1988 MAR 18 PM 1:55

MAUI ARCHITECTURAL GROUP, Inc., a Hawaii corporation, KONRAD GROND CONTRACTING, aka Grond Contracting, Inc., a Hawaii corporation, Plaintiffs-Appellees, vs. WILLIAM R. BURT, Defendant-Appellant.	CIV. NO. 5300(2) APPEAL FROM: (1) ORDER GRANTING PLAINTIFFS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION, FILED OCTOBER 14, 1982; (2) ORDER CONFIRMING AMERICAN ARBITRATION AWARD; ENTRY OF JUDGMENT AND JUDGMENT AND DENYING DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT ARBITRATION AWARD, FILED MAY 13, 1987; (3) ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT AMERICAN ARBITRATION AWARD, FILED JUNE 1, 1987; (4) ORDER DENYING DEFENDANT'S MOTION FOR DISQUALIFICATION AND DENYING DEFENDANT'S MOTION TO AMEND PLEADINGS TO INCLUDE ADDITIONAL COUNTERCLAIM UNDER RULES 59(a) and 59(e) OF THE HAWAII RULES OF CIVIL PROCEDURE AND STAY UNDER SECTION 641-3(c) OF THE HAWAII REVISED STATUTES, FILED JUNE 24, 1987 SECOND CIRCUIT COURT HONORABLE ARTHUR T. UEOKA and RICHARD R. KOMO, JUDGES

ORDER DENYING MOTION FOR RECONSIDERATION

The Motion for Reconsideration filed on March 16, 1988

EXHIBIT B

is denied without argument.

DATED: Honolulu, Hawaii, March 19, 1999.

Shackley F. Raffetto (Jaress & Raffetto, of counsel) on the motion for appellant

EXHIBIT B-2

LODGED
MAY 18 1988
CLERK, U. S. DISTRICT COURT
DISTRICT OF HAWAII

JAMES KRUEGER
Attorney at Law
A Law Corporation

JAMES KRUEGER 492
KEVIN H.S. YUEN 3509
2065 Main Street
Post Office Box T
Wailuku, Maui, Hawaii 96793

Telephone: 244-7444 (Maui)
536-7474 (Honolulu)

Attorneys for Plaintiffs

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
MAY 25 1988
at ___ o'clock and ___ min. ___ M.
WALTER A. Y. H. CHINN, CLERK

81-01 KHSY:SOS:jb

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAUI ARCHITECTURAL GROUP, INC., a Hawaii Corporation, KONRAD GROND CONTRACTING, aka GROND CONTRACTING, INC. A Hawaii Corporation,	Civil No. 88-00257ACK No. 12259, Supreme Court of Hawaii, No. 5300(2), Second Circuit Court
Plaintiffs,	ORDER ON PLAINTIFFS' MOTION TO DISMISS PETITION FOR REMOVAL OF CIVIL NO. 5300(2) FROM THE SUPREME COURT OF HAWAII TO THE U.S. FEDERAL DISTRICT COURT FOR THE DISTRICT OF HAWAII
vs.	
WILLIAM R. BURT,	
Defendant.	

ORDER ON PLAINTIFFS' MOTION TO DISMISS
PETITION FOR REMOVAL OF CIVIL NO. 5300(2)
FROM THE SUPREME COURT OF HAWAII TO THE U.S.
FEDERAL DISTRICT COURT FOR THE DISTRICT OF HAWAII

Plaintiffs' motion to dismiss petition for removal of Civil No. 5300(2) from the Supreme Court of Hawaii to the U.S. Federal District Court for the

EXHIBIT C

District of Hawaii came on for hearing before the Honorable Jack Tanner on May 9, 1988. The parties having appeared thereat, and the court having had the benefit of reviewing the record and files herein and listening to the presentation of counsel,

GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' motion to dismiss petition for removal of Civil No. 5300(2) from the Supreme Court of Hawaii to the U.S. Federal District Court for the District of Hawaii is hereby granted in its entirety.

DATED AT Honolulu, Hawaii May 27, 1988.

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

JAMES KRUEGER
KEVIN H.S. YUEN

WILLIAM R. BURT

ORDER ON PLAINTIFFS' MOTION TO DISMISS PETITION FOR REMOVAL OF CIVIL NO. 5300(2) FROM THE SUPREME COURT OF THE STATE OF HAWAII TO THE U.S. FEDERAL DISTRICT COURT FOR THE DISTRICT OF HAWAII
MAUI ARCHITECTURAL GROUP v. BURT
Civil No. 88-025?ACK, United States District Court

EXHIBIT C-2

NITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF HAWAII
P O BOX 50129
300 ALA MOANA BLVD
HONOLULU HAWAII 96850

WALTER A.Y.H. CHINN
CLERK

TELEPHONE
(808) 541-1300
FTS 551-1300

May 27, 1988

Clerk
Supreme Court, State of Hawaii
P.O. Box 2560
Hon., HI 96804

Re: Maui Architectural Group, Inc., et al. vs. William Burt
Civil No. 88-00257 ACK
Your number 12259

Dear Sir:

Please be advised that on May 25, 1988, this case was remanded the the Supreme Court, State of Hawaii. Enclosed is a certified copy of the orcer.

Sincereiy,

WALTER A.Y.H. CHINN, Clerk

by _____
Deputy Clerk

cc: all parties of record
enc.

Please acanowledge receipt on the copy of this letter and return.

Dated: _____ By: _____

EXHIBIT D

COPY

NO. 12259

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1987

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND CONTRACTING, aka Grond Contracting, Inc., a Hawaii corporation, Plaintiffs-Appellees, vs. WILLIAM R. BURT, Defendant-Appellant.	NO. 5300(2) APPEAL FROM [1] ORDER GRANTING PLAINTIFFS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION, FILED OCTOBER 14, 1982; [2] ORDER CONFIRMING AMERICAN ARBITRATION AWARD; ENTRY OF JUDGMENT AND JUDGMENT AND DENYING DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT ARBITRATION AWARD, FILED MAY 13, 1987; [3] ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT AMERICAN ARBITRATION AWARD, FILED JUNE 1, 1987; [4] ORDER DENYING DEFENDANT'S MOTION FOR DISQUALIFICATION AND DENYING DEFENDANT'S MOTION TO AMEND PLEADINGS TO INCLUDE ADDITIONAL COUNTERCLAIM UNDER RULES 59(a) AND 59(e) OF THE HAWAII RULES OF CIVIL PROCEDURE AND STAY UNDER SECTION 641-1(c) OF THE HAWAII REVISED STATUTES, FILED JUNE 24, 1987

EXHIBIT E

)
) SECOND CIRCUIT COURT
)
) HONORABLE ARTHUR T. UEOKA
) HONORABLE RICHARD R. KOMO
) Judges
)

JUDGMENT ON APPEAL

and

CERTIFICATE OF SERVICE

JAMES KRUEGER
Attorney at Law
A Law Corporation

JAMES KRUEGER 492
TIMOTHY P. McNULTY 4324
MAGALI V. PICHTER 4411
KEVIN H.S. YUEN 3509
2065 Main Street
P. O. Box T
Wailuku, Maui, HI 96793

Tel: 244-7444 (Maui)
536-7474 (Honolulu)

Attorneys for plaintiffs-appellees
81-00001 JK/SOS:jkw

E-2

NO. 12259

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1987

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, KONRAD GROND CONTRACTING, aka Grond Contracting, Inc., a Hawaii corporation, Plaintiffs-Appellees, vs. WILLIAM R. BURT, Defendant-Appellant.	NO. 5300(2) APPEAL FROM [1] ORDER GRANTING PLAINTIFFS' MOTION TO STAY PROCEEDINGS PENDING ARBITRATION, FILED OCTOBER 14, 1982; [2] ORDER CONFIRMING AMERICAN ARBITRATION AWARD; ENTRY OF JUDGMENT AND JUDGMENT AND DENYING DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT ARBITRATION AWARD, FILED MAY 13, 1987; [3] ORDER DENYING MOTION FOR RECONSIDERATION OF DENIAL OF DEFENDANT'S MOTION UNDER SECTION 658-8, HAWAII REVISED STATUTES, TO VACATE, MODIFY OR CORRECT AMERICAN ARBITRATION AWARD, FILED JUNE 1, 1987; [4] ORDER DENYING DEFENDANT'S MOTION FOR DISQUALIFICATION AND DENYING DEFENDANT'S MOTION TO AMEND PLEADINGS TO INCLUDE ADDITIONAL COUNTERCLAIM UNDER RULES 59(a) AND 59(e) OF THE HAWAII RULES OF CIVIL PROCEDURE AND STAY UNDER SECTION 641-3(c) OF THE HAWAII REVISED STATUTES, FILED JUNE 24, 1987

EXHIBIT E-3

)
) SECOND CIRCUIT COURT
)
) HONORABLE ARTHUR T. UEOKA
) HONORABLE RICHARD R. KOMO
) Judges
)

JUDGMENT ON APPEAL

Pursuant to Memorandum Opinion of the Supreme Court, State of Hawaii, entered herein on March 8, 1988, the Judgment of the lower court entered on May 13, 1987 is affirmed.

DATED: Honolulu, Hawaii, JUN 1988

BY THE COURT:

Eugene L Sakada
Of Clerk

APPROVED:

Edward H. Nakamura
Associate Justice

EXHIBIT E-4

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Judgment on Appeal was provided by United States mail, this 22th day of March, 1988, to:

Shackley F. Raffetto, Esquire
Jaress & Raffetto
Attorneys at Law
2170-B Main Street
Suite 12
P.O. Box 1147
Wailuku, Maui, HI 96793
Telephone: 244-9007

Attorneys for defendant-appellant

DATED AT Wailuku, Maui, Hawaii, MAR 28 1988

JAMES KRUEGER
TIMOTHY P. McNULTY
MAGALI V. RICHTER
KEVIN H.S. YUEN

Attorneys for plaintiffs-appellees

EXHIBIT E-5

FILED

JUL 28 1988

CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAUI ARCHITECTURAL GROUP, INC., a Hawaii corporation, et al.,	)	No. 88-2806
Plaintiffs-Appellees,	)	DC# CV-88-257-ACK Hawaii
vs.	)	
WILLIAM R. BURT,	)	ORDER
Defendant-Appellant.	)	

Before: ALARCON, POOLE and O'SCANNLAIN, Circuit Judges

Appellees' motion to dismiss the appeal for lack of jurisdiction is granted. See 28 U.S.C. § 1447(d). Appellant's emergency motion for a temporary restraining order is denied as moot.

Appellees' request for the imposition of sanctions against appellant is granted. See Fed. R. App. P. 38. Appellees are awarded their attorney fees and single costs incurred in moving to dismiss this appeal and in opposing appellant's emergency motion. Within 14 days from the entry of this order, appellees shall file a statement of the costs and fees incurred.

Misc. Memos 7/28/88

EXHIBIT F